Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1545

TRUMAN BURGE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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No.

TRUMAN BURGE,

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v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND REQUEST FOR SUMMARY REVERSAL

Truman Burge, your Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois, and the Petitioner further requests Summary Reversal.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported verbatim herein. (App. "A", p. I.) The opinion of the State of Illinois Appellate Court, Fourth District is reported verbatim herein. (App. "B", pp. I-VIII.)

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on the 21st day of March, 1975. (App. "A", p. I.) The jurisdiction of this Court is invoked under the provisions of Title 28, U.S.C., Section 1257(3).

QUESTIONS PRESENTED

Whether the Petitioner should be discharged where inconsistent verdict expresses acquittal?

Whether the jury's verdict as to reckless conduct was a determination favorable to Petitioner of the facts essential to conviction of aggravated battery?

Whether Petitioner's denial of probation was to deny the defendant equal protection of the law and due process?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five, Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1, Amendment Fourteen, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

> the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2, Article 1, Constitution of the State of Illinois, 1970:

> "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

Section 10, Article 1, Constitution of the United States:

> "No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense."

Section 11, Article 1, Constitution of Illinois, 1970:

> "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship . . ."

STATEMENT

The defendant was a deputy sheriff in Sangamon County and keeping company with the victim, a widow with three children. A great deal of the evidence in this case generally is background evidence involving the question of motive, intent and jealousy of the defendant and previous threats made by him against her. That the defendant became increasingly unhappy over her keeping company with other young men is clearly disclosed together with his indication of displeasure made known to her and their friends on several occasions including some more or less thinly-veiled threats. On the evening in question in the parking lot of the tavern where the defendant, the victim, and several of their friends had been together, the defendant obtained a shotgun from his car from which one shot was fired, severely injuring the victim. In the parking lot, he leveled the shotgun at her striking her in the left arm and abdomen and permanently injuring her to the extent that several operations were necessary and at the time of the trial nerves in her left arm had not yet reactivated themselves. The operations resulted in a shorter arm. The defendant had been drinking at the time. There was conflict in the evidence as to whether the victim pushed aside the shotgun causing the discharge.

The record also shows that the defendant was a large man and had had two operations himself which were causing him physical discomfort and perhaps contributing to his jealousy and irritability. The defendant asked for probation and some 15 or 20 witnesses testified in aggravation and mitigation. The victim opposed probation and the probation officer to whom the matter was referred recommended that probation be denied. It can be fairly said that this denial was not per se because of a bad past record or per-

sonality, but because a lethal weapon was used. Defendant was denied probation and sentence was imposed.

The jury found the defendant guilty of reckless conduct and aggravated battery. Sentence was imposed of 1 to 10 years. The Appellate Court for the Fourth District of Illinois affirmed the aggravated battery conviction, but reversed the reckless conduct conviction.

The Supreme Court of Illinois on March 21, 1975 denied the defendant's petition for leave to appeal.

The federal questions of constitutionality were raised on post-trial motions claiming error of the trial court and presented to the Appellate Court by way of briefs. The issue of collateral estoppel and double jeopardy was raised in the Supreme Court of Illinois.

REASONS FOR GRANTING THE WRIT

I.

The court below has decided Federal questions of substance in conflict with the due process principles and equal protection of the laws principles enunciated in this Court. It has departed from the accepted and usual course of judicial proceedings, and its sanction of such departure by the court resulted in an erroneous judgment and a miscarriage of justice, and deprived the Petitioner of his rights to due process of law and equal protection of the law.

There have been numerous cases in Illinois where a defendant has been charged and found guilty of two separate offenses arising from the same act, and such conviction has been reversed upon appeal. It is a well established principle of law that in the crime of shooting and wounding another person, reckless conduct is a lesser included offense of aggravated battery. *People v. Thomas,* 1 Ill.App.3d 139, 275 N.E.2d 253.

A distinction between a defendant convicted of one of several separate offenses charged arising out of a single act has been established as an important distinction from situations where the defendant is charged with a specific offense arising out of a single act, and is later convicted not only of the specific offenses (e.g. aggravated battery), with which he was charged, but also with a lesser included offense of the specific offense (e.g. reckless conduct).

A leading case concerning convictions for both aggravated battery and reckless conduct is *People v. Norris,* 118 Ill.App. 2d 406, 254 N.E.2d 304, where the defendant was found guilty of aggravated battery and reckless conduct but the charges were based upon four separate and distinct acts of physical violence by the defendant. The Second District Appellate Court, in affirming the convictions of the defendant, stated as follows:

"Defendant contends that the jury verdicts finding him guilty of aggravated battery and reckless conduct were fatally inconsistent in that the intent elements of each offense are mutually exclusive. The State agrees with the defendant's contention that the intent elements of the crimes of aggravated battery and reckless conduct are different, and that inconsistent verdicts cannot stand. The intent element to support a verdict of aggravated battery is that the act be done intentionally and knowingly; while the intent element to support a verdict of reckless conduct is that the act be done recklessly. The State points out, however, that the time period involved extends from Tuesday to Saturday and that the testimony shows four different acts of physical violence by the defendant upon the deceased. The jury could very well conclude that some of the defendant's acts, such as throwing her from the bed and striking her, were knowing and intentional; while other acts, such as dragging her around the apartment, were reckless and thus found that more than one act was involved so that the finding of guilty as to both

aggravated battery and reckless conduct were the result of different acts and not the same act. In our opinion the verdicts were not inconsistent and are, therefore, sustained. It is noted that the defendant was only sentenced on the aggravated battery conviction." *People v. Norris,* supra, at 409-10.

It is important to note that in the *Norris* decision, the court emphasized the fact that the charges against the defendant were based upon separate and distinct acts, some of which the jury could conclude were acts of reckless conduct and others of which it could conclude constituted aggravated battery. It would seem then, that in a case where verdicts of guilty were rendered for both aggravated battery and reckless conduct arising out of a single act by a defendant such verdicts would be legally inconsistent and could not stand in view of the language of the *Norris* case.

In the instant case, the defendant, Truman Burge, was charged by indictment with the offenses of attempted murder and aggravated battery based on a single act — the firing of the shot which wounded the victim, Doris Wanless — on January 30, 1972. As pointed out earlier, the fact that the separate offenses charged were based on a single act allegedly committed by the defendant is of paramount importance because at that point in time — the span of seconds — when the single act giving rise to the charges against the defendant occurred, the defendant could be capable of a single state of mind or mental state. The mental state required for a finding of guilty on the charge of reckless conduct as a lesser included offense of aggravated battery and ultimately given to the jury by the court in the instant case, was that the act which caused bodily harm to the victim was performed "recklessly." The mental state required in the instant case for a finding of guilty on the charge of aggravated battery, according to the "ele-

ments of the offense" instruction submitted by the Prosecution and ultimately given by the court to the jury, was that bodily harm was caused knowingly and intentionally. The distinction between acting "recklessly" and "knowingly or intentionally" are obvious as the State conceded in the *Norris* decision, supra. As the court in *People v. Thomas,* citing the *Norris* opinion, concluded on the facts of that case (it involved a shooting incident wherein the defendant was holding a gun on the victim and it subsequently shot the victim) "that reckless conduct is included within the offense of aggravated battery and that the only element of difference relates to the degree of culpability and the less of these relates to reckless conduct." *People v. Thomas,* 1 Ill.App.3d 139 at 143, 275 N.E.2d 253.

The People's Instruction #17 as given, defining the issues in aggravated battery is as follows:

> "To sustain the charge of Aggravated Battery, the State must prove the following propositions:
>
> First: That the Defendant knowingly or intentionally caused great bodily harm to Doris Wanless;
>
> Second: That the Defendant used a deadly weapon; and
>
> Third: That the Defendant was then capable of acting knowingly or intentionally.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty."

That the jury in the instant case determined as the trier of fact was that the defendant did not commit the offense of attempted murder as charged, but that the defendant

was guilty of the offense of aggravated battery and, consequently, at the instant that the single act constituting the crime was committed necessarily had "knowingly or intentionally" caused the great bodily harm to the victim, and that the defendant was also guilty of the offense (lesser included offense) of reckless conduct and consequently at the same instant that the single act aforementioned constituting the crime was committed, also had a mental state whereby he "recklessly" performed the act causing the injury. In other words, the jury found that at the instant that the single act giving rise to the criminal charges against the defendant was committed, the defendant had two mutually exclusive mental states. It is blatantly obvious that the defendant could not be acting both intentionally and recklessly at the same time, as the court in *People v. Norris* and *People v. Thomas* readily recognized.

In *People v. Norris,* as pointed out earlier, the court affirmed the convictions of the defendant for both aggravated battery and reckless conduct because the charges against the defendant as well as the evidence, were based on at least four separate and distinct acts by the defendant, and the court felt that the jurors, as triers of fact, could have found that some of the four separate acts were performed recklessly and others constituted conduct encompassed by aggravated battery and, therefore, the verdicts on both charges were not inconsistent as a matter of law. In the instant case, neither the counts of the indictment nor the evidence show separate and distinct acts by the defendant but rather, a single act at a single split second in time.

Therefore, the basis of the *Thomas* and *Norris* decisions, the verdicts in the instant case are inconsistent as a matter of law, and therefore, the convictions of the defendant for aggravated battery and the lesser included offense of reck-

less conduct must be reversed and the case must be remanded for a new trial.

The Appellate Court has concluded that the only element of difference between reckless conduct and aggravated battery, is the degree of culpability. We respectfully suggest that it is one of intent.

It is respectfully suggested that verdicts respecting the several counts of an indictment must be consistent, and that reversal is required where the verdict on the counts as to which defendant was convicted cannot be reconciled logically with that on the counts as to which an acquittal was returned. This rule has been recognized in *People v. Bailey,* 391 Ill. 149, 154 (1945). The court held on page 154 that:

> "The logical effect and meaning of a general verdict finding a defendant 'guilty in manner and form as charged in the indictment' and that he is guilty in manner and form as charged in each count of the indictment. *A verdict cannot be sustained if it is inconsistent, but a finding that a defendant is guilty of simple robbery and of robbery with a dangerous weapon is not inconsistent or repugnant.* (People v. Bell, 328 Ill. 446; Murray v. United States, 10 Fed. 2d 409, certiorari denied 46 S.Ct. 486.) *The more serious crime includes the simpler one. Every person who robs with a dangerous weapon robs nevertheless,* (Murray v. United States, 10 Fed. 2d 409,) *and a count charging the greater offense contains every material element of a count charging the lesser.* People v. Bell, 328 Ill. 446."

The Federal Circuits have previously followed the same rule. In *Speiller v. United States,* 31 Fed. 2d 682, 684 (1929) a Third Circuit case, the court held that where there is an acquittal on one count of an indictment and a conviction on another count of an indictment charging the same crime, the verdic of conviction will not be allowed to stand unless

supported by evidence other than that on which the acquittal was based. There is no other evidence in the case at bar other than what the acquittal was based upon. In *Rosenthal v. United States,* 276 Fed. 714, 715 (1921) a Ninth Circuit cause of action, the court held that reversible inconsistency results where the verdict acquitting the accused on one count of the indictment tends to negate the existence of an element essential to the proof of the crime charged in another count on which he was convicted. The court said that a count charging the defendant with having the same property in his possession was acknowledged and a second count was based on the same transaction, and that the evidence showed only one transaction, a verdict finding the defendant not guilty on the first count but guilty on the second count was wholly inconsistent and required a reversal. It is respectfully suggested that in the case at bar, there is a single transaction. Although the crime of armed robbery and the crime of murder are separate and distinct crimes, based upon the single transaction in the case at bar upon the evidence by the jury acquitting on murder considering the crime of armed robbery, the verdicts are inconsistent and the defendant must and should be discharged.

Further, it has been held that verdicts of acquittal on some counts, and conviction on other counts in an indictment may be reversibly inconsistent if the same evidence was relied upon by the prosecution in support of all the counts. *John Hohenadel Brewing Company v. United States,* 295 Fed. 489, at page 490 (1924) (C.A.3d)

It is conceded that all of the Federal Circuit cases heretofore cited were overruled by *Dunn v. United States,* 34 U.S. 390, 76 L.Ed. 356, 52 S.Ct. 189 (1932), which held that consistency between the verdict on the several counts of an indictment or information is unnecessary where the defendant is convicted on one or some counts but acquitted on

others, and the conviction would generally be upheld irrespective of its rational incompatibility with the acquittal. However, it is noted, *Dunn,* supra, was decided on January 11, 1932.

Mr. Justice Butler dissenting said at page 398 that:

> "By finding petitioner not guilty under the second and third counts the jury conclusively established that the evidence was not sufficient to prove the unlawful possession or sale there alleged. Since the first count charged nothing more than unlawful possession, this amounted to contradictory findings on the same fact. But even if that count charged a nuisance, the unlawful keeping of that liquor for sale was essential to the offense, in fact the corpus delicti, and the verdict of guilty necessarily included a finding of the very possession that was conclusively negatived by the verdict under the second count. If the finding of guilty on the first count were not contradicted by another finding contained in the same verdict or if it stood alone, a judgment would properly be entered thereon convicting petitioner of the unlawful possession."
>
> "... Nothing remains to support the opposite finding under the first count. The repugnancy is such that if the first is accepted the second must be rejected. I am of opinion that this record plainly requires an express and unqualified decision that these findings conflict and are completely repugnant."

He further stated at page 400 that:

> "Where one by different counts is accused of two crimes which by reason of their nature cannot be committed by the same person, a verdict of guilty on both counts will be held so inconsistent with itself and so uncertain in law that no judgment can be entered thereon. Such verdicts are so meaningless as to be without force."

As to jury speculation, Justice Butler stated at page 407 that:

> "The law does not permit investigations into the deliberations of juries for ascertainment as a matter of fact upon what considerations verdicts are reached; the soundness of that rule has never been questioned. There are stronger reasons against speculating whether, or assuming that, the jury through tenderness of disposition, mercy or forbearance acquitted while knowing that its duty was to convict the accused. Conflict between the finding may not be explained. The inference that the jury, seeking rightly to discharge its duty, made a mistake is to be preferred over the suggestion that it found for defendant upon an assumption of power it may not lawfully exert."

In *People v. Hairston,* 46 Ill. 2d 348, (1970), the defendant was tried for the separate crimes of murder, attempted murder, and solicitation to commit such crimes in a single proceeding. The defendant was found not guilty on the charges of the principal offenses. The defendant contended that the verdicts were inconsistent and that he must be discharged. The court held that when verdicts inconsistently acquit and convict of separate crimes arising from the same act, logical consistency in verdicts in such instances is not necessary, so long as the verdicts are not legally inconsistent. It is noted that the verdicts must not be legally inconsistent. The court said at page 849 that:

> "Within our own jurisdiction we have, in those instances where inconsistent verdicts of guilty were returned on separate indictments or separate indictments or separate counts of a single indictment, aligned ourselves with those who hold that a reversal and new trial must follow, (e.g., *Tobin v. People,* 104 Ill. 565 — larceny and receiving stolen property.) But where, as here, the verdicts inconsistently acquit and convict of separate crimes arising from the same act, our courts have followed the view that logical consistency in verdicts in such instances is not necessary, so long as the verdicts are not legally inconsistent *(People v. Raddatz,* 403 Ill. 48, 85, N.E.2d 807; *People v. Ingersoll,* 58

Ill. App. 2d 216, 208 N.E.2d 79; and see *People v. Garman,* 411 Ill. 279, 103 N.E.2d 636). To use the words of the court in *State v. Baird,* 200 Wash. 227, 93 P. 2d 409, 412, we follow the view that: 'In law there is no inconsistency in verdicts of acquittal and conviction upon charges of crimes composed of different elements, but arising out of the same state of facts.' The verdicts here were legally consistent, if not logically so, and defendant's claim of a right to discharge must be denied."

II.

The defendant contends that his constitutional rights are violated by reason that he is incarcerated and under jury conviction in violation of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States of America. The Fifth Amendment to the Constitution of the United States provides that no person shall be twice put in jeopardy for the same offense and the Fourteenth Amendment to the Constitution of the United States applies said prohibition to the states. The Constitution of the State of Illinois provides for the same.

It has been repeatedly held that a state cannot bring successive prosecutions for different crimes out of the same set of circumstances on the basis that the doctrines of Collateral Estoppel and Double Jeopardy bar successive prosecutions.

Query: Assuming that the Defendant, Truman Burge, was convicted of reckless conduct as in this case and subsequently tried in a separate trial for aggravated battery, could the subsequent aggravated battery trial proceed? To ask the question is to answer it in the negative as it would be barred by the doctrines of Collateral Estoppel and Double Jeopardy.

In *Sealfron v. United States,* 332 U.S. 575, 92 L.Ed. 180, 68 S.Ct. 237 (1948) the Court held that an acquittal of a

conspiracy case was res judicata to a subsequent prosecution for the commission of the substantive offense as an accessory on the same circumstances and facts involved in the prior trial and conspiracy which resulted in an acquittal.

In *Ashe v. Swenson,* 397 U.S. 436, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970) it was held that collateral estoppel in criminal trials is a integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. Collateral estoppel is defined as simply that when an issue of ultimate fact has been once determined by a valid and final judgment that issue cannot again be litigated between the same parties at any future lawsuit. In *Ashe,* supra, the petitioner was acquitted in a state trial for the robbery of one of the players in a poker game. Six weeks thereafter the petitioner was tried for the robbery of another of the players in the poker game and was convicted. The Court overturned the conviction.

In *Simpson v. Florida,* 403 U.S. 384, 29 L.Ed. 2d, 549, 91 S.Ct. 1801 (1971), the petitioner was tried and acquitted of the charge of armed robbery of a store manager. In a subsequent trial in State Court, the first trial having been a State Court trial, the defendant was convicted of the charge of armed robbery of a customer in the store. The Court said that unless the jury verdict in the second trial could have been grounded upon an issue other than that which the petitioner seeks to foreclose from consideration the constitutional guarantee against being twice put in jeopardy for the same offense officiates the petitioner's conviction.

In *Harris v. Washington,* 404 U.S. 55 30 L.Ed. 2d 212, 92 S.Ct. 183 (1971) the Court held that a defendant who is acquitted for the murder of one of the persons where a bomb had been sent through the mail killing two people, and at a subsequent trial convicting the defendant for the

murder of the other person, collateral estoppel was an integral part of the constitutional guarantee against double jeopardy and was to be applied and, therefore, the conviction was reversed.

In *Turner v. Arkansas,* 407 U.S. 366, 32 L.Ed. 2d 798, 92 S.Ct. 2096 (1972) in an Arkansas murder prosecution the trial court instructed on the criminal responsibility of an accessory and the jury was instructed that it must find defendant guilty of first degree murder if it found that he had killed the decedent either with premeditation or unintentionally during the course of a robbery. The Court said that the only logical conclusion from the general verdict of the acquittal of the first degree murder charge was that the jury found the defendant was not present at the scene of the robbery and murder even if the murder had actually been committed by an alleged accomplice in the robbery. The Court held that a subsequent prosecution for robbery wherein the defendant was convicted was foreclosed as the State was collaterally estopped from relitigating the issue as to whether the defendant had been present at the scene.

The instruction in *Turner,* supra, was that "an accessory is one who stands by, aids, abets or assists . . . the perpetration of a crime . . . or persons being present aiding and abetting, or ready and consenting to aiding and abetting in any felony, shall be deemed principal offenders and indicted or informed against, and punished as such." The Court said at page 369 that "had the jury found petitioner present at the crime scene, it would have been obligated to return a verdict of guilty of murder even if it believed that he had not actually pulled the trigger. The only logical conclusion is that the jury found him not present at the scene of the murder and robbery, a finding that negates the possibility of a constitutionally valid conviction for the robbery of Yates."

In the case at bar, had the jury believed that the defendant committed aggravated battery because of intent, it would have been obligated to return a verdict of not guilty as to reckless conduct.

If two separate juries hearing different offenses, based on the same circumstances and same facts, cannot arrive at opposite conclusions and the Constitution prohibits a subsequent prosecution upon the same facts for different persons where the first trial has resulted in an acquittal it is respectfully suggested that the same constitutional prohibitions apply to a jury verdict in the same case. We suggest that the doctrine of collateral estoppel and res judicata apply to the same jury who arrives at inconsistent verdicts.

In Illinois, the Supreme Court has taken the position that where a former prosecution results in an acquittal for a lesser included offense, a subsequent prosecution for the greater offense charged is barred. *People v. Liddell,* 353 Ill. 201, at page 204, 187 N.E. 2d 174 (1933).

A second application of the doctrine of double jeopardy as a bar to a subsequent prosecution for a different offense is that a former conviction or acquittal of murder will bar a subsequent prosecution for manslaughter based upon the same facts. *People v. Dugas,* 310 Ill. 291, at page 299, 141 N.E. 2d 769 (1923).

Therefore, the opinions of the Supreme Court of Illinois and the Appellate Court for the Fourth Appellate District should be reversed.

III.

The probation officer's recommendations for denial of probation were that it would be difficult for anyone to say that the defendant would not commit a similar offense, as this was not expected of the defendant in the first place,

and secondly, that his conduct over the weeks prior to the occurrence in connection with the victim was not of a trained and well-qualified police officer. As the Appellate Court said at page 3 of their opinion, "We think it can be fairly said that the denial was not per se because of a bad past record or personality, but because a lethal weapon was used." To deny the defendant probation because a lethal weapon was used is to deny the defendant the equal protection of the law, wherein probation is not prohibited where a lethal weapon is involved. We respectfully suggest that the court abused its discretion in denying probation.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari and Request for Summary Reversal should be granted. The decision below is palpably erroneous.

Respectfully submitted,

MICHAEL J. COSTELLO
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Springfield, Illinois 62705
Attorney for Petitioner

APPENDIX A

STATE OF ILLINOIS
OFFICE OF CLERK OF THE SUPREME COURT
SPRINGFIELD 62706
Telephone: Area Code 217/782-2035

March 21, 1975

Mr. Truman Burge
521 South Daniels
Springfield, Illinois 62703

No. 47298 — People State of Illinois, respondent vs. Truman Burge, petitioner. Leave to appeal, Appellate Court, Fourth District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX B

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge
HONORABLE SAMUEL O. SMITH, Judge
HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day of December A.D. 1974, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12141 Agenda No. 74-177

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TRUMAN BURGE, Defendant-Appellant.	Appeal from Circuit Court Sangamon County 109-72

MR. JUSTICE SMITH delivered the opinion of the court:

This is an appeal from the circuit court of Sangamon

County imposing a sentence of 1 to 10 years on a jury verdict finding the defendant guilty of aggravated battery and reckless conduct. In this court, the defendant contends (1) that jury verdicts of guilty to aggravated battery and to reckless conduct arising out of the single shooting of one person are mutually inconsistent as a matter of law and the defendant is entitled to a new trial on such verdicts, (2) whether preliminary evidence setting forth the relationship between the victim and the defendant over a period of time was irrelevant and immaterial and prejudicial to the defendant warranting a new trial, (3) whether the prosecutor made improper statements regarding the evidence and the law so as to inflame the jury warrant a new trial, (4) whether the court erred in instructing the jury, (5) whether the court erred in denying defendant's motion for probation and imposing the sentence appealed from, and (6) whether the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt. We affirm the trial court.

The defendant was a deputy sheriff in Sangamon County and keeping company with the victim, a widow with three children. A great deal of the evidence in this case generally is background evidence involving the question of motive, intent and jealousy of the defendant and previous threats made by him against her. That the defendant became increasingly unhappy over her keeping company with other young men is clearly disclosed together with his indication of displeasure made known to her and their friends on several occasions including some more or less thinly-veiled threats. On the evening in question in the parking lot of the tavern where the defendant, the victim and several of their friends had been together, the defendant obtained a shotgun from his car from which one shot was fired, severely injuring the victim. In the parking lot, he leveled the shotgun at her striking her in the left arm and abdomen and

permanently injuring her to the extent that several operations were necessary and at the time of the trial nerves in her left arm had not yet reactivated themselves. The operations resulted in a shorter arm. The defendant had been drinking at the time.

The record also shows that the defendant was a large man and had had two operations himself which were causing him physical discomfort and perhaps contributing to his jealousy and irritability. The defendant asked for probation and some 15 or 20 witnesses testified in aggravation and mitigation. The victim opposed probation and the probation officer to whom the matter was referred recommended that probation be denied. We think it can be fairly said that this denial was not per se because of a bad past record or personality, but because a lethal weapon was used. Defendant was denied probation and the sentence noted was imposed.

In *People v. Thomas,* 1 Ill.App.3d 139, 275 N.E.2d 253, this court held that the offense of reckless conduct is a lesser included offense of aggravated battery. Under the circumstances in that case, we did so on the defendant's claim that reckless conduct is a separate statutorily defined offense. The defendant was indicted for attempted murder, upon which a verdict of acquittal was directed for the offense of aggravated battery. The jury was instructed that reckless conduct was a lesser included offense of aggravated battery and defendant was found guilty of that lesser offense. In that case we referred to *People v. Norris,* 118 Ill. App.2d 406, 254 N.E.2d 304, where our colleagues on the second district discussed the question of inconsistency between aggravated battery and reckless conduct and whether or not they were mutually exclusive. In that case, however, the events took place over several days and the court observed that a finding of guilty as to both was justified on

the theory that different acts were involved. In *Thomas,* we concluded that the only element of difference relates to the degree of culpability and the lesser of these relates to reckless conduct. Neither of these cases fully answer the issue here raised. It can be said that in *Norris* the court implied that aggravated battery and reckless conduct arising out of the striking of one victim would be mutually inconsistent. That court did not meet that issue nor did it decide it. The jury's verdict in the case at bar is not one where the defendant was found guilty of one and not guilty of the other arising out of the same act, but rather guilty of both arising out of the same act. Thus, the real issue here raised is whether or not the jury was justified in its verdict of finding this defendant guilty of both aggravated battery and reckless conduct. Adhering to the views expressed in *Thomas* that we deal only with degrees of culpability and noting that the sentence here was one sentence of aggravated battery, we should reverse the conviction of the lesser crime of reckless conduct, provided the conviction for the greater is affirmed. *People v. Leggett,* 2 Ill.App.3d 962, 275 N.E.2d 651.

The defendant further complains that evidence and circumstances in the record were prejudicial to the defendant and thus denied him a fair trial. He objected to the People's introduction of a pistol which the evidence shows had been used on prior occasions to threaten the victim. The argument is that it was not in use at the time of the incident here in question and therefore inadmissible. This pistol was not introduced for the purpose of showing that the defendant had committed another crime but for the purpose of establishing the defendant's mental state towards the victim. In the context of this case and the circumstances of this shooting it was not error to admit it. *(People v. Dewey,* 42 Ill.2d 148, 246 N.E.2d 232; *People v. Bauer,* 7

Ill.App.3d 512, 288 N.E.2d 24; *People v. Smith,* 3 Ill.App. 3d 958, 279 N.E.2d 512.) The pistol was not used by the prosecution in closing argument nor did it go to the jury room. Evidence that he had otherwise threatened the victim some two weeks before was objected to and admitted. Defendant objected to the testimony of another witness that the defendant pointed the shotgun at him and his wife immediately following this shooting. Such evidence is admissible to establish the frame of mind of the defendant at and immediately following the occurrence in question. Defendant further complains that the victim wept during the course of the trial and that this entitles him to a new trial. This occurred while the victim was recounting her injuries suffered at the hands of the defendant and when we consider her previous friendly relationship with this defendant and the fact that from his act and his conduct, she had not yet regained the use of her arm and which would be shorter for the rest of her life, it appears to us that an emotional reaction on her part and under such circumstances is neither surprising nor contrived for the purpose of getting the sympathy of the jury. A prompt and quick recess was immediately called by the trial judge to give the witness time to compose herself. Witnesses or parties do not leave their God-given human emotions at home or in the hallway outside the courtroom and it is to be expected that in a strange atmosphere and the stress of testifying, a witness may display some emotion. Any trial judge knows that this is not infrequent and quickly recognizes when it appears to be contrived rather than an irresistible consequence of strain. Here it clearly appears to have been spontaneous.

The defendant next objects to the prosecutor's use in closing argument of pieces of paper on which were written certain instructions. We have some difficulty in following

defendant's objections to the use of these documents or exactly how they were used in the closing argument. There is no charge that the prosecutor misstated the law. It is urged that the prosecutor's argument that the defense of intoxication was no defense whatsoever was prejudicial. This statement is clearly taken out of context and was used in relation to the defendant's condition at the time of the incident rather than a bald statement that intoxication is never a defense. This argument is likewise without merit and is supported only by the case of *People v. Weinstein,* 35 Ill.2d 467, 220 N.E.2d 432. That case is readily distinguishable from this case in that there the prosecutor misstated to the jury the law on the presumption of innocence. That case has little relationship to the incidents here complained about.

The defendant likewise argues that a circumstantial evidence instruction should not be given because all of the evidence in this case was direct rather than circumstantial, and under said circumstances no circumstantial evidence instruction should be given. *(People v. Gardner,* 4 Ill.2d 232, 122 N.E.2d 578.) If there was no circumstantial evidence in the case, we fail to see how the jury was misled. If there was, it was proper.

The defendant contends that the trial court erred in denying the defendant's motion for probation and cites the number of people called in his behalf, his record as a deputy sheriff and as a law-abiding citizen in the community, and suggests that the trial court overlooked the constitutional order and mandate that in sentencing the penalties "shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship". The defendant cites *People v. Steadman,* 3 Ill.App.3d 1047, 280 N.E.2d 17, a case which we think is not apropos to the position of the defendant. We assume,

although the defendant does not say so, that he has no quarrel with the proposition that the offense here considered is not only serious but could well have resulted in death rather than injury. We take it therefore that the abuse of discretion by the trial court, if any, is based upon the objective of restoring the offender to useful citizenship. It is clear here that the trial court considered the granting of probation in this case. The probation officer recommended that it be denied and gave his reasons for such recommendation, that it, (1) it would be difficult for anyone to say that this defendant would not commit a similar offense as no one would have expected this of him in the first place, and (2) his conduct over the previous several weeks in connection with this victim was conduct that is hardly indicated as that of a trained and well-qualified police officer. If anyone should have known better, he should. We cannot say on this record that the court abused its disc 'ion in denying the defendant probation and it is such discretion only that this court can review under *People ex rel. Ward v. Moran,* 54 Ill.2d 552, 301 N.E.2d 300. We cannot say that here the trial court abused its discretion in its determination that a nonprison sentence would deprecate the seriousness of the offense.

The defendant lastly asserts that his guilt was not established beyond a reasonable doubt. We have carefully reviewed the evidence as well as the defendant's argument. Neither point out wherein there is any insufficiency to remove all reasonable doubt of the defendant's guilt. The assertion of a failure to prove guilt beyond a reasonable doubt without pointing out to this court what and where it is, and where a statement of the facts by the defendant himself established that guilt beyond a reasonable doubt, such alleged error is purely semantics.

Accordingly, the judgment of the trial court should be and it is hereby affirmed. The conviction for reckless conduct is reversed.

Affirmed in part; reversed in part.

SIMKINS, P.J., TRAPP, J., concur.